SUPREME COURT, U. S.
No. 74-193, No. 74-238

Supreme Court, U. S.
FILED
1975
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

STATE OF WISCONSIN, *Petitioner*
v.
NATIONAL LIBERTY LIFE INSURANCE COMPANY,
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

NATIONAL LIBERTY LIFE INSURANCE COMPANY,
a Pennsylvania corporation, *Appellant*
v.
STATE OF WISCONSIN, *Respondent*

On Cross Appeal from the Supreme Court of Wisconsin

SUPPLEMENTAL BRIEF FOR RESPONDENT CROSS-APPELLANT

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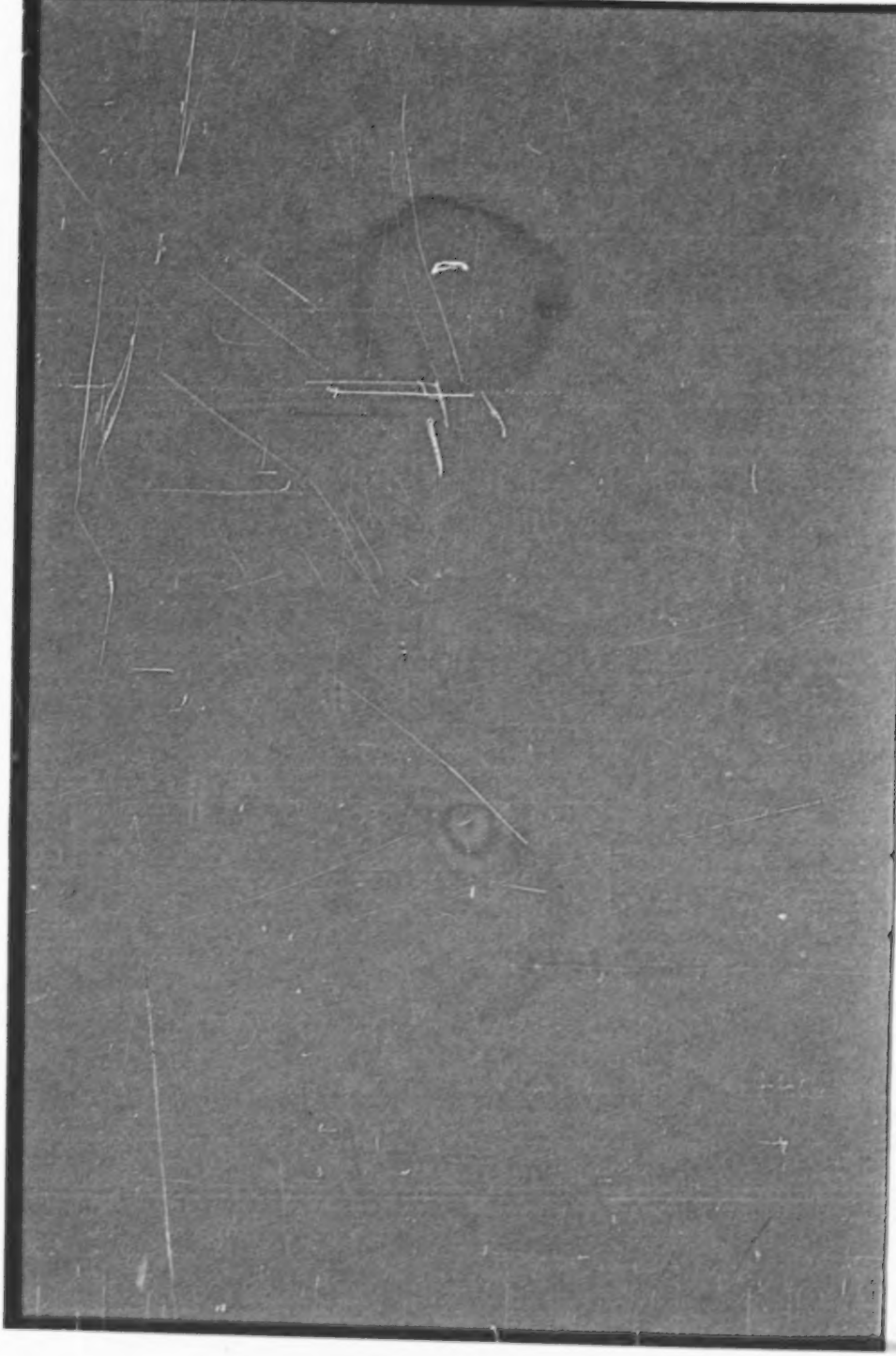

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Counsel for National Liberty Life Insurance Company assume that action in the above proceedings has been deferred pending the decision in *Standard Pressed Steel Company* v. *Department of Revenue*, Docket No. 73-1697, which was announced on January 22, 1974.

In National's Brief in Opposition to the Petition for Certiorari, Docket No. 74-193, at page 14, the basic

distinctions between the cases were pointed out, but with the opinion in *Standard* now available a more detailed comment might be helpful to the Court.

Standard upheld a Washington State tax on the privilege of "engaging within the state in the business of making sales at wholesale" equal to 44/100th of 1% of gross receipts within Washington. Thus, the tax was a modest one, in the nature of a sales tax, imposed with respect to just one narrow local aspect or segment of the taxpayer's business.

Agent within the State. Standard maintained a full time employee in Washington who made possible the realization and continuance of valuable contractual relations with its principal customer there, and the Court held this constituted a sufficient nexus to support the tax.

In reaching this conclusion, however, the Court reaffirmed the primary holding of *Norton Co.* v. *Department of Revenue,* 340 U.S. 534 (1951), later confirmed in *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753 (1967), that a mail order business does not involve a tax nexus in the destination state. It simply found *Norton* inapplicable under the circumstances. In the instant case, on the other hand, there was no presence within the State, the business being carried on solely through the mails, and thus falling squarely within the newly reaffirmed primary holding of *Norton.*

Apportionment. Standard also reaffirmed the holding in *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434 (1939), that a tax measured by the entire volume of interstate commerce involving facilities and

personnel within and without the State must be apportioned to the activities within and without the State.

Gwin was also held to be inapplicable in *Standard*, however, since the tax in *Standard* was upon the act of "wholesaling" and in *Standard* there was no contention or proof of activities outside the state in connection with the Washington *wholesaling* business. The Court held, instead, that the situation was similar to that of the local brokerage business involved in *Ficklen* v. *Shelby County Taxing District*, 145 U.S. 1 (1892), where, as stated in *Gwin*, the gross receipts used in the measure of the tax were "precisely apportioned" to the activities involved, "all of which are intrastate".

In *National*, on the contrary, the Wisconsin Supreme Court has held that out-of-state activities were taxed, and since the Wisconsin gross premium tax was "clearly unapportioned" to activities within the state, it was unconstitutional as a violation of the due process clause. (Opinion below, Jurisdictional Statement, Docket No. 74-238, pages 22(a) and 23(a).)

The two cases are thus at opposite poles on apportionment. In *Standard* all the activities of wholesaling to Boeing were within Washington so far as was disclosed by the record, and thus no basis was laid for apportionment. In *National*, on the other hand, it is clear from the record that there was no activity, personnel or property within Wisconsin, the entire business being conducted through the mails from Pennsylvania. (Complaint, Paragraphs (4), (5) and (6), Brief in Opposition, Docket No. 74-193, pages 1(a) and 2(a); Opinion below, Jurisdictional Statement, Docket No. 74-238, at page 22(a).)

The thrust of *Standard* is presence and jurisdiction to tax. Apportionment was put in issue by the taxpayer only incidentally, if at all, and the Court found no proof of out-of-state activities related to the Washington wholesaling business.

The major issue before the Court in the instant case, on the other hand, is apportionment, and the totally or predominantly out-of-state nature of National's activities is clearly established in the record and recognized by the Wisconsin Supreme Court.

Nature and Burden of the Tax. The tax in *Standard* is a levy of 44/100% on the gross receipts from wholesaling within the State. By contrast, in the instant case the tax is a 3% gross premium tax imposed upon the entire proceeds of an interstate mail order insurance business conducted from Pennsylvania.

Thus the tax in *Standard* is different in nature, and less than 1/6th as burdensome, a 3% gross receipts tax such as that in *National* being roughly equivalent to a 30% net income tax. (See Jurisdictional Statement, Docket No. 74-238, footnote 2, at page 6.)

CONCLUSION

Standard is thus clearly distinguishable from the instant case on the facts. *Standard* involves the important aspect of physical presence in the State, whereas *National* does not. *Standard* involves totally or predominantly in-state activities while *National* is just the opposite, involving totally or predominantly out-of-state activities. And finally, the nature and burdens of the taxes are different.

Furthermore, there is nothing in either the holding or the opinion of the Wisconsin Court in *National*

inconsistent with either the opinion or the holding in *Standard*. On the contrary, *Standard* actually reaffirms the essential concept on which the decision and opinion in *National* are based, i.e., that apportionment is constitutionally required where an interstate business is conducted through the mails because of the totally or predominantly out-of-state nature of the mail order business.

In any event, the case is not worthy of this Court's consideration. Although of precedent value elsewhere, the decision of the Supreme Court of Wisconsin is binding only in that State. There is no conflict of decisions with *Standard* or otherwise. There is no occasion for review by this Court at this time.

The Petition for Writ of Certiorari should be denied, and in such case, the Cross Appeal should be dismissed as moot.

Respectfully submitted,

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